Office - Supreme Court, U.S.
FILED
JUN 8 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1834

In The
Supreme Court of the United States
October Term, 1984

WINFORD KENT BISHOP,

Petitioner,

vs.

INTERNATIONAL PAPER COMPANY, JEFFREY M. SMITH, CHARLES MYNEDER, and BEN R. SWANK, JR.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEFFREY M. SMITH
(Counsel of Record)
THOMAS B. METZLOFF
BONDURANT, STEPHENSON & SMITH
2200 First Atlanta Tower
Two Peachtree Street, N.W.
Atlanta, Georgia 30383-4501
(404) 581-5200

Counsel for Respondents International Paper Company, Jeffrey M. Smith, Charles Myneder, and Ben R. Swank, Jr.

COCKLE
BEST AVAILABLE COPY

18 pp

QUESTION PRESENTED

On the specific facts of this case, did a State Supreme Court properly impose a small sanction of $200 against the Petitioner for filing a frivolous petition for a writ of certiorari after receiving notice and being provided an opportunity to respond?

TABLE OF CONTENTS

	Pages
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	8
ARGUMENT	9
CONCLUSION	13

TABLE OF AUTHORITIES

CASES:

Bishop v. International Paper Co., 173 Ga.App. 34, 325 S.E.2d 870 (1984) 7

Blanton v. Equitable Bank, National Association, 61 Md.App. 158, 485 A.2d 694 (1985) 11

Broyles v. Estate of Brown, 295 Or. 795, 671 P. 2d 94 (1983) 12

George W. Bennett Bryson & Co. v. Norton Lilly & Co., 502 F.2d 1045 (5th Cir. 1974) 11

Burgamy v. Holton, 165 Ga. 384, 141 S.E. 42 (1927) 6

Evans v. Arthur, 139 Ariz. 362, 678 P.2d 943 (1984) 12

FCC v. WJR, The Goodwill Station, Inc., 337 U.S. 265 (1949) 12

In the Marriage of Flaherty, 646 P.2d 179 (Cal. 1982) 12

In Re Matter of Georgia Paneling, Supply, Inc., 607 F.2d 1004 (5th Cir. 1979), *vacated*, 613 F.2d 312 (5th Cir. 1980), *affirmed*, 617 F.2d 293 (5th Cir. 1980), *rehearing en banc denied*, 618 F.2d 1389 (5th Cir. 1980) 3

TABLE OF AUTHORITIES—Continued

Pages

In the matter of Georgia Paneling Supply, Inc., 581 F.2d 520 (5th Cir. 1978), *vacated*, 588 F.2d 93 (5th Cir. 1979), *affirmed*, 607 F.2d 117 (5th Cir. 1980), *vacated*, 613 F.2d 137 (5th Cir. 1980); *previous decision reinstated*, 616 F.2d 893 (5th Cir. 1980) 3

Groendyke Transport, Inc. v. Davis, 406 F.2d 1158 (5th Cir. 1969), *cert. denied*, 394 U.S. 1012 (5th Cir. 1969) 11

Hahne v. Hahne, 663 S.W.2d 77 (Tex.App. 1983) 12

Magnesium Casting Co. v. Hoban, 401 F.2d 516 (4th Cir. 1968), *cert. denied*, 393 U.S. 1065 (1969) 11

Midas Muffler Shop v. Ellison, 133 Ariz. 194, 650 P.2d 496 (1982) 12

Mitchell v. W. Atlee Burpee Co., 196 Cal.Rptr. 479, 148 Cal.App.3d 1198 (1984) 12

NLRB v. Local No. 42, 476 F.2d 275 (3d Cir. 1973) 11

Matter of Estate of Suesz, 228 Kan. 275, 613 P.2d 947 (1980) 12

OTHER AUTHORITIES:

Rule 14 of the Georgia Supreme Court 7, 10

Respondents International Paper Company, Jeffrey M. Smith, Charles Myneder, and Ben R. Swank, Jr. respectfully oppose the Petition for Writ of Certiorari to the Supreme Court of Georgia and the Court of Appeals of Georgia, and hereby show that this case should not be reviewed by this Court pursuant to Rule 17.

———o———

STATEMENT OF THE CASE

The present petition for certiorari is the fourth petition filed by Mr. Bishop in connection with the same operative events. Despite its lengthy procedural history, this specific episode is nothing but a state contract law case raising no issue of any significance. Indeed, petitioner Winford Kent Bishop's filing is simply another in a long line of attempts to harass his opponents.

It is not possible to understand the pattern of confusion caused by Mr. Bishop without some background information. Much of Mr. Bishop's recitation of "facts" in his petition for certiorari is flawed and is not supported by anything other than his own opinion. The following is intended as a concise overview of the relevant procedural events necessary to demonstrate to the Court that this fact-specific case does not merit review.

In 1972 and 1973, Respondent International Paper Company ("International Paper") sold building materials to an Atlanta-based company. That company was later found to be bankrupt while still owing International Paper a reasonably large sum of money.

Various unsecured creditors including International Paper believed that two other creditors had received preferences. Ultimately, the Bankruptcy Trustee filed suit. *Pennington v. Aetna Business Credit, Inc. and The C & S Bank of North Fulton*, Civ. Action No. C75-1540 (N.D. Ga.). The unsecured creditors, including International Paper, were permitted to join the Trustee in asserting certain claims.

This decade-old bankruptcy suit is pertinent only because International Paper, as well as other creditors, hired petitioner Winfred Kent Bishop ("Mr. Bishop") to represent them in the proceedings. Petitioner was initially paid a straight hourly fee. In June, 1977, the fee arrangement was changed to a contingency fee agreement.[1]

The *Pennington* suit did not go well. The case became embroiled in procedural difficulties, side issues, and personality conflicts. Due to the poor preparation of the case by Mr. Bishop, adverse rulings by the courts, and a growing exposure to claims by Aetna and C & S, International Paper determined to settle its claims. This decision was not reached until *after* District Judge Richard Freeman upheld awards by Bankruptcy Judge William Norton of approximately $30,000 in attorney's fees against the plaintiff creditors, including International Paper, and Mr. Bishop all based on Mr. Bishop's frivolous motion practice. The creditors, including International Paper, ultimately paid these penalties.

---

[1]Petitioner has alleged, and International Paper has disputed, that another change in the fee arrangement was made in 1978.

Mr. Bishop's response has been to make allegations of improper or unprofessional conduct against both judges. Indeed, Mr. Bishop has already filed three petitions for certiorari to this Court relating to his allegations against various federal judges and private attorneys. *See Quinault Pacific Corp. v. Aetna Business Credit, Inc.*, Case Nos. 80-344, 80-345, *cert. denied*, 449 U.S. 954 (1980).[2]

Mr. Bishop refused to assist his client, International Paper, in consummating the settlement, and instead demanded to be paid over $170,000, which he claimed was International Paper's share of his total attorney's fees and expenses attributable to the case. International Paper unsuccessfully tried to resolve its dispute with Mr. Bishop who endeavored to prevent the settlement with Aetna and C & S. At that point, International Paper formally terminated Mr. Bishop as its attorney.

The amount of International Paper's fee obligation to Mr. Bishop, if any, was questionable. The contingent fee agreement with Mr. Bishop provided that he would

---

[2]The procedural history of Mr. Bishop's meanderings in the Court of Appeals is even more convoluted than his efforts to obtain some sort of review in this Court. At one point, Mr. Bishop was litigating two related claims that went through a series of procedural maneuverings in the Court of Appeals. *See In the matter of Georgia Paneling Supply, Inc.*, 581 F.2d 520 (5th Cir. 1978) (Case No. 78-8283), *vacated*, 588 F.2d 93 (5th Cir. 1979), *affirmed*, 607 F.2d 117 (5th Cir. 1980) (Case No. 79-1076), *vacated*, 613 F.2d 137 (5th Cir. 1980), *previous decision reinstated*, 616 F.2d 893 (5th Cir. 1980). A second appeal, Case No. 78-3370, went through a similar process. *See In P Matter of Georgia Paneling Supply, Inc.*, 607 F.2d 1004 (5th .r. 1979) (affirming decision below in an unpublished opinion), *vacated*, 613 F.2d 312 (5th Cir. 1980) (vacating previous opinion), *affirmed*, 617 F.2d 293 (5th Cir. 1980) (affirming decision again), *rehearing en banc denied*, 618 F.2d 1389 (5th Cir. 1980).

receive a percentage of International Paper's recovery. Under the settlement with Aetna and C & S, International Paper received nothing. International Paper also disputed numerous items in Mr. Bishop's "bill" as being of no value to it, including time spent reading "The Brethren."

International Paper then retained the law firm of Bondurant, Miller, Hishon & Stephenson in Atlanta to complete the settlement with Aetna and C & S, and to help resolve its dispute with Mr. Bishop. The firm assigned lead responsibility to respondent Jeffrey M. Smith. Thomas B. Metzloff, an associate at the firm, also performed a substantial amount of work on the matter. The settlement between International Paper and Aetna and C & S was then completed.[3]

International Paper and Mr. Bishop were unable to resolve their dispute over the fee, if any, owing to Mr. Bishop. On September 24, 1982, International Paper filed a lawsuit seeking declaratory relief and damages resulting from Mr. Bishop's negligence. *International Paper*

---

[3]The settlement was final to everyone but Mr. Bishop who again burdened the courts with appeals. On May 20, 1983, Mr. Bishop filed a 450-page "Extraordinary Writ" in the United States Court of Appeals for the Eleventh Circuit attempting to resurrect the bankruptcy claim of one of the creditors because of the same charges of judicial misconduct. *In Re Quinault Pacific Corp.*, Case No. 83-8357 (11th Cir.). The Eleventh Circuit denied the Writ without comment on June 2, 1983. Mr. Bishop's subsequent petition for *rehearing en banc* was denied on July 28, 1983. Undeterred, Mr. Bishop filed his *third petition for certiorari* in this Court on October 29, 1983. *Quinault Pacific Corp. v. Barclays American/Business Credit, Inc.*, No. 83-708. The petition was denied on January 9, 1984. *See* 52 U.S.L.W. 3510.

Company v. Winford Kent Bishop, Civil Action File No. C82-2504 (N.D. Ga.). Mr. Bishop responded by filing his own action against International Paper and its attorneys, respondents Charles Myneder (in-house counsel), Ben R. Swank, Jr. (outside counsel), and Jeffrey M. Smith (outside litigation counsel for these proceedings). *Winford Kent Bishop v. International Paper Company, et al.,* Civil Action File No. C-91586 (Fulton Superior Court).

Mr. Bishop's suit alleged numerous counts including breach of contract and libel. During the next few months, the parties actively litigated their respective cases. Mr. Bishop filed lengthy affidavits in both cases claiming a long history of Judge Freeman's bias against him, and a conspiracy between Judge Freeman, Bankruptcy Judge Norton, and other attorneys to deny his rights. Mr. Bishop did "prove" he had so much time on his hands that pursuing the case would result in massive expenditures by International Paper.

The parties ultimately agreed to settle all pending cases and potential claims. Pursuant to a Settlement Agreement and General Release (attached to Mr. Bishop's Petition at A-82), International Paper paid Mr. Bishop $100,000.00 in settlement of all claims on January 3, 1983. Pursuant to the settlement agreement, dismissals with prejudice of the pending cases were executed and duly filed.

Within ten weeks, Mr. Bishop violated the express terms of the Settlement Agreement and General Release by filing another lawsuit against the respondents. The complaint was virtually identical with his previous suit

that had been dismissed with prejudice.[4] While this situation is intolerable regardless of the plaintiff, the egregious breach of the Settlement Agreement was even more reprehensible since Mr. Bishop is a practicing attorney licensed in Georgia. It must be that he understands the significance of settling a case for valuable consideration.

The respondents moved for summary judgment. The only issue was whether the Settlement Agreement and the dismissals with prejudice barred his refiling of the virtually identical suit.[5]

The trial court granted respondent's motion for summary judgment, and dismissed the case. In doing so, the court rejected Mr. Bishop's mischaracterization of the Settlement Agreement as an executory accord and as a Trust. It found that the Settlement Agreement was a binding contract and would not permit Mr. Bishop to proceed in violation of its provisions.

---

[4]Mr. Bishop filed the suit without tendering return of the $100,000.00 in settlement proceeds which is a pre-condition under Georgia law for attempting to void a settlement agreement. *See, e.g., Burgamy v. Holton,* 165 Ga. 384, 396-97, 141 S.E. 42 (1927).

[5]In their answers, respondents also filed a counterclaim seeking damages against Mr. Bishop for his breach of the settlement agreement contract. Subsequent to the Georgia Court of Appeals' decision set forth in this petition, the trial court issued an order on September 20, 1984 that Mr. Bishop was liable in damages to respondents in an amount to be determined subsequently at a trial on damages only. Consistent with his piecemeal litigation tactics, Mr. Bishop appealed this second order to the Georgia Court of Appeals. On May 8, 1985, the Georgia Court of Appeals affirmed the trial court's decision finding Mr. Bishop liable in damages to the respondents. The Court of Appeals denied Mr. Bishop's motion for rehearing on May 28, 1985.

On November 24, 1984, the Georgia Court of Appeals affirmed the trial court's dismissal. *Bishop v. International Paper Co.*, 173 Ga.App. 34, 325 S.E.2d 870 (1984). It held that Mr. Bishop's appeal was frivolous and initially assessed a penalty of $500. The Court of Appeals subsequently issued a revised opinion, which, while still holding the appeal to be frivolous, removed the monetary sanction apparently because the new rule permitting such a penalty came into effect after Mr. Bishop filed his appeal.

As found by the Georgia Court of Appeals, there was no argument whatsoever to justify Mr. Bishop's filing of a second suit against respondents after having already settled the matter. Like any settlement agreement where litigation is pending, both the express and inherent purpose of the Settlement Agreement was to conclude the litigation for all time by permanently releasing all claims.

Having notice that the Georgia Court of Appeals had held that his appeal was frivolous, Mr. Bishop nonetheless filed a petition for discretionary review to the Georgia Supreme Court. Like this Court, its standards for granting certiorari are limited to cases that present issues of public importance. Mr. Bishop's appeal to the Georgia Court of Appeals, which was an appeal of right, was frivolous. *A fortiorari,* Mr. Bishop's petition to the Georgia Supreme Court with its limited review powers was even more frivolous.

Respondents opposed Mr. Bishop's petition, and *filed a Motion for Sanctions under Rule 14 of the Georgia*

Supreme Court.[6] *Mr. Bishop did not file a response to respondents' Motion for Sanctions,* although he had a right to do so. Neither did Mr. Bishop request an oral argument on the motion. On January 25, 1985, the Georgia Supreme Court denied Mr. Bishop's petition for certiorari, and imposed a sanction of $200 against him pursuant to Rule 14. Mr. Bishop only then addressed the merits of respondents' motion for sanctions by filing an extensive petition for rehearing. It was denied on February 21, 1985.

The Georgia Supreme Court's imposition of sanctions was appropriate. This case involves an attorney who accepted $100,000 in settlement of a claim, executed valid dismissals with prejudice, and then refiled the same claims within ten weeks of receiving the funds without any plausible legal theory to support his actions.

SUMMARY OF ARGUMENT

This case involves a state law claim relating to the application of a settlement agreement. The Georgia courts properly determined that petitioner's suit was barred by the prior settlement agreement.

---

[6]Rule 14 provides as follows:

> The court may with or without a motion impose a penalty not to exceed $500.00 against an appellant in any civil case in which there is a direct appeal, application for discretionary appeal, application for interlocutory appeal, petition for certiorari or motion which the court determines to be frivolous. This rule applies only to those cases in which there is no money judgment.

The Georgia Supreme Court acted properly in imposing a sanction. Its Rule 14 is virtually identical in all material respects to the rule in effect in this Court, the federal Courts of Appeals, and numerous state courts concerning frivolous appeals. Contrary to petitioner's claim, he was afforded ample notice and opportunity to respond on the sanction issue. Respondents filed a Motion for Sanctions to which petitioner had the right to respond. Similarly, after the decision awarding the sanction was rendered, petitioner filed a 21-page petition for rehearing expressing his views on the appropriateness of the sanction.

Petitioner had express notice of respondents' motion and an opportunity to respond. Accordingly, his was afforded due process. Mr. Bishop's claims to the contrary are non-meritorious, and raise no issue worthy of this Court's review. The Constitution does not require an appellate court to conduct oral argument before imposing a small monetary penalty against a party or attorney for frivolous filings.

ARGUMENT

Mr. Bishop's argument is difficult to understand. On occasion he alludes to his unsuccessful state law claims. The fact that none of the Georgia courts agreed with his assertion that the settlement agreement was an executory accord or a trust under law of Georgia does not present a worthy issue to this Court. The law of Georgia simply does not support his position. There are no fed-

eral questions relating to the substantive claims determined below by the Georgia courts.

Petitioner's claims only address the Georgia court's imposition of monetary penalties. His challenge of the Georgia Court of Appeals' penalty is without merit, however, as that court determined *not* to impose a sanction. Accordingly, Mr. Bishop has no standing and justiciability concerns dictate that there is no case or controversy relating to the Court of Appeals' decision since no sanction was imposed.

It is equally clear that Mr. Bishop's complaint about the Georgia Supreme Court's $200 penalty does not present an issue worthy of this Court's attention. Contrary to the claims in his petition, Mr. Bishop had ample prior opportunity to address the merits of the possible imposition of a penalty by the Georgia Supreme Court. The following points are relevant to petitioner's "due process" argument:

1. Since the Georgia Court of Appeals found Mr. Bishop's appeal to be frivolous, Mr. Bishop was on notice of a probable similar finding by the Georgia Supreme Court. With this knowledge, he nonetheless filed his petition and unsuccessfully urged the "non-frivolous" character of his position directly in his petition to the Georgia Supreme Court.

2. Respondents filed a motion for sanctions pursuant to Georgia Supreme Court Rule 14. The motion was served on petitioner, and put petitioner on notice that an issue under Rule 14 existed. Petitioner elected not to file a response to the motion.

3. Petitioner did not request oral argument on respondents' motion for sanctions.

4. After the Georgia Supreme Court's imposition of the penalty, petitioner filed a 21-page petition for rehearing together with a lengthy affidavit attempting to justify his frivolous filing.

Clearly, petitioner's claim that sanctions were imposed against him without any due process protections is incorrect. *Cf. Blanton v. Equitable Bank, National Association,* 61 Md.App. 158, 485 A.2d 694, 699 (1985) (where opposing party moved for sanctions and attorney had opportunity to respond to that motion, due process requirements were met).

Petitioner claims nothing short of a constitutional right to force appellate courts to conduct an oral hearing before imposing modest sanctions against parties or attorneys for the filing of frivolous appeals. This Court imposes sanctions for the filing of frivolous appeals under Rule 49.1 without oral argument. Moreover, it is universally accepted that due process guarantees do not require that oral argument be conducted. Rather, the opportunity to be heard component of due process is satisfied by the opportunity to submit written briefs on the issue in question. *See Groendyke Transport, Inc. v. Davis,* 406 F.2d 1158, 1162 (5th Cir. 1969) ("[b]y long practice and frequently by express rules, important substantive or procedural issues are fully and finally disposed of by the highest of tribunals wholly on written papers without oral argument of any kind"), *cert. denied,* 394 U.S. 1012 (1969); *George W. Bennett Bryson & Co. v. Norton Lilly & Co.,* 502 F.2d 1045, 1050-1051 (5th Cir. 1974); *NLRB*

v. Local No. 42, 476 F.2d 275 (3d Cir. 1973); *Magnesium Casting Co. v. Hoban,* 401 F.2d 516, 518 (4th Cir. 1968), *cert. denied,* 393 U.S. 1065 (1969). *See FCC v. WJR, The Goodwill Station, Inc.,* 337 U.S. 265, 276 (1949) ("the Constitution does not require oral argument in all cases").

Similar sanctions have been imposed for filing frivolous appeals against parties and attorneys without providing an oral hearing on the issue. *See, e.g., Broyles v. Estate of Brown,* 295 Or. 795, 671 P.2d 94 (1983); *Evans v. Arthur,* 139 Ariz. 362, 678 P.2d 943 (1984); *Midas Muffler Shop v. Ellison,* 133 Ariz. 194, 650 P.2d 496 (1982); *Hahne v. Hahne,* 663 S.W.2d 77 (Tex.App. 1983); *Matter of Estate of Suesz,* 228 Kan. 275, 613 P.2d 947, 950 (1980).[7]

The remaining legal theories set forth by petitioner are so insubstantial as to not require any comment.

———o———

[7]Mr. Bishop's citation of *In the Marriage of Flaherty,* 646 P.2d 179 (Cal. 1982) is inapposite. First, the discussion of due process requirements in that case is dicta given the Court's finding that the appeal was not frivolous. Second, it is unclear whether the due process rights described in dicta arose from the state or federal constitution. Third, there is a crucial distinction between *Flaherty* and this case which is ignored by petitioner. In this case, the penalty was imposed against Mr. Bishop as a *party,* and only incidentally in his capacity as an attorney. The due process requirements discussed in dicta in *Flaherty* relate only to sanctions to be imposed against an attorney. Any requirements under California law do not apply where the penalty is imposed against a party as opposed to an attorney. *See, e.g., Mitchell v. W. Atlee Burpee Co.,* 196 Cal. Rptr. 479, 148 Cal.App.3d 1198 (1984).

CONCLUSION

The petition should be denied.

Respectfully submitted,

JEFFREY M. SMITH
(Counsel of Record)
THOMAS B. METZLOFF

BONDURANT, STEPHENSON & SMITH
2200 First Atlanta Tower
Atlanta, Georgia 30383-4501
(404) 581-5200

Attorneys for Respondents International Paper Company, Jeffrey M. Smith, Charles Myneder, and Ben R. Swank, Jr.